THE POWER OF THE PRESIDENT OVER FOREIGN AFFAIRS.

IN a recent article in the New York Times[1] former Assistant Attorney General James M. Beck challenges the constitutionality of the measures which President Wilson has taken in the carrying out of the foreign affairs policy of this government. While his criticism is especially directed against the action of the President in appointing such confidential agents as John Lind and Colonel House without the consent of the Senate, he makes the sweeping assertion that the President must share the general control of foreign affairs with the Senate. Mr. Beck's position is clearly shown in the following quotations from his article: "Those provisions of the Constitution which require the concurrence of the Senate with the President in the conduct of our foreign relations, have been observed and cherished with a general and jealous acceptance of their wisdom." * * * "To the framers of the Constitution there was no provision of greater importance than those which required joint action by the Executive and the Senate in determining the Foreign Policy of the Republic. To them this concurrent authority marked the principal distinction between a monarchy and a republic."

There are two propositions set forth in these quotations: (1) The constitution provides for a concurrent jurisdiction—a common control over foreign affairs—to be exercised by the President and the Senate conjointly. (2) This policy of the division of the control of foreign relations has been the "cherished" policy of this government since 1789.

The Constitution provides that "the executive Power" shall be vested in the President of the United States, and that "all legislative Power herein granted" shall be vested in Congress. Is the power to regulate foreign relations executive or legislative by nature? The Constitution itself gives a clue to the solution of this question. The first three articles of this instrument deal respectively with (1) Legislative power, (2) Executive power, and (3) Judicial power. It is in article (2) dealing with the power of the President that provision is made for the control of foreign affairs. The one important exception to this is in the case of the power to declare war. In the Constitutional Convention there was some discussion as to the branch of the government to which this power should be rightly given. It was finally decided that it was properly a legislative function which should therefore be given to Congress and not to the Executive.

[1] February 27, 1916.

Madison and Gerry were able to have the clause giving Congress the power to "make" war changed so as to give that body only the power of "declaring" war, still leaving to the President the power of making war in the case of invasion or sudden attack.[2]

An examination of the location of the power over foreign affairs in other governments than the United States shows of what nature this power is considered to be. In all the great European countries, the executive branch of the government has exclusive control, and the concurrence of the legislatures is only sought in regard to treaties which require legislative action.

The opinion of Jefferson, who generally opposed a broad construction of executive power, is interesting in this regard, and is strong evidence of the opinion of those who were contemporaries of the adoption of the constitution. He says: "The transaction of business with Foreign Nations is executive altogether. It belongs then to the head of that department except as to such portions of it as are especially submitted to the Senate."[3]

This is a correct statement of the position which has been generally held in regard to the power of the President over foreign relations. As a branch of "The Executive Power," granted to the President by the Constitution, it is under his exclusive control except where by express provision special portions of this power are shared with the Senate by the president.

Executive Power is not clearly defined in the constitution, while Legislative Power is there defined and limited to the powers specifically granted and those powers necessary and proper to carry into execution the powers specifically granted. The Senate, a legislative body, can make no constitutional claim to share the general executive power of the President over foreign relations for a very brief period of our history during Washington's first administration, an attempt was made by the President to treat with the Senate as an executive council in foreign affairs. Although at that time the Senate was a small enough body to make such a move possible, Washington found that the Upper House could not be conveniently dealt with in this way. Since his administration there has been no attempt to treat the Senate as an executive council, which would be the natural and inevitable result of giving it a general concurrent control over foreign affairs.

The very wording of the clauses of the Constitution which join the President and Senate, in regard to the appointment of ambassa-

[2] 2 Farrand, Records of the Federal Convention. 318.

[3] Jeffersonian Encyclopedia, 713.

dors, ministers, and consuls, and the making of treaties, shows the relative importance of the two in these regards. It is the President who is to appoint; the Senate has only the power of a negative, of checking—no positive, constructive power. The same is true of the treaty power. While the constitution provides that treaties are to be made by the President, by and with the advice and consent of the Senate, this clause has never been interpreted to mean that the Senate has an equal share with the President in the making of treaties. Here again its power is rather negative than positive. The initiative is entirely in the hands of the President; though Congress occasionally exercises the power of amendment, which is conditioned upon the acceptance of the amendment by the President. The one attempt of Congress to legislate on the subject matter of a treaty received the prompt veto of President Jackson, as being inconsistent with the principle of the division of powers in the Constitution, "as it is obviously founded on the assumption that an act of Congress can give power to the Executive or the head of one of the departments to negotiate with a foreign government." The President goes on to say that the Executive has competent authority to negotiate a treaty with a foreign government, "an authority Congress can not constitutionally abridge or increase."[4]

It is hardly necessary to bring forward any further evidence to show the inaccuracy of the claim of Mr. Beck that the constitution has provided for a concurrent control of foreign affairs. Is he any more correct in claiming that the practice under the Constitution has recognized the necessity for this division of power; and that President Wilson has departed from the traditions of constitutional construction in sending a personal envoy to foreign countries without the Senate's consent?

The important policies of this country in regard to foreign countries have been decided upon by the President without the consultation or advice of the Senate, whether in the form of resolutions or legislative enactments.

Washington decided upon the position of *Neutrality* in 1793, and left to the Senate the duty of making his declaration effective by passing the necessary laws. Jefferson took upon himself the responsibility of the Louisiana purchase without previously consulting the Senate. Monroe on his own initiative, with the advice of John Q. Adams, his Secretary of State, in his message of 1823, enunciated the doctrine which has made his name famous. This list might be indefinitely prolonged. It suffices, however, to show that it has

[4] Jackson's Message to Congress, 3 Richardson's Messages, 146.

traditionally been the President who has determined upon the foreign policy of the country, it has been Congress that has exercised its discretion in carrying out this policy where it has been dependent upon legislative action.

In the matter of recognition of new states, the President has sometimes been forced to fall back upon Congress, in order to obtain the necessary appropriation for the appointment of the new diplomatic representative. That the final decision in the matter is his has rarely been questioned. "In every case, as it appears, of a new government and of belligerency, the question of recognition was determined solely by the Executive. In the case of the Spanish-American Republic of Texas, of Hayti and of Liberia, the President before recognizing the new state invoked the judgment and co-operation of Congress. In numerous other cases the recognition was given by the Executive solely on his own responsibility."[5] Here again there is no attempt to assert the concurrent jurisdiction of Congress. President Wilson's attitude in regard to Mexico, his recognition of one faction, and his failure to recognize another, may be challenged on the ground of expediency, but not on the ground of constitutionality. Since the power to recognize new states has been acquiesced in, there can hardly be any doubt as to the power to recognize a new government in an old state.

Even the power of declaring war, which under the constitution was vested in Congress, has never assumed great importance, due to the freedom that has been accorded the Executive in his dealings with foreign powers. The control over diplomatic negotiations has placed in his hands the manipulation of the possible causes of a war, while his position as Commander in Chief of the army and navy has given him the necessary weapons for prosecuting a war once commenced. The distinction which was made in the Constitutional Convention between the power to "declare" war, and the power to "make" war, has assumed great importance. This latter power is practically assured to the President. Congress has the power to legalize war, as a status. The President has the power to make it inevitable. Polk clearly did this in the case of Mexico, while the messages of President Madison, and President McKinley, before the war of 1812 and the Spanish war respectively, made the resulting declarations by Congress foregone conclusions.

To conclude today that the power of the President and the power of the Senate over foreign affairs is concurrent, is both theoretically and historically incorrect. The constitution does not provide for such a

[5] 1 Moore, Digest of International Law, 244.

division of power, nor does the actual interpretation of that instrument, as shown in the history of the past 125 years, bear out any such interpretation. While it can well be held that the constitution is not an unchangeable instrument, that it can and does adapt itself to changing circumstances, it is not necessary to resort to any such expedient to explain the position of the President and his predominance over foreign affairs. His position in this regard has not materially changed since the time of Washington, and Jefferson's statement, as quoted above, that "the transactions of business with Foreign Nations is executive altogether" is true today not by a strained and developed construction of the Constitution, but by virtue of a uniform interpretation from that day to this.

Is the action of President Wilson in appointing special agents to Mexico and the European powers, a new and unheard-of departure from custom and usage, and from a fair construction of Executive power, as defined in the Constitution? The question, here, is not one of expediency, but of constitutionality, and the answer can best be found by a consideration first of the terms of the Constitution, and second, by ascertaining what construction has been placed upon these terms.

The Constitution provides that the President "shall nominate and by and with the advice and consent of the Senate shall appoint ambassadors, other public ministers, and consuls." Mr. Beck, at one point in his article, referring to this clause, says that "the Constitution has expressly provided that the President should *not* send *to any foreign nation* any ambassador, consul or other *officer* except with the advice and consent of the Senate," (italics ours). Elementary text books on logic forbid any such liberty with the English language as Mr. Beck has here taken. Further, the phrase "to any foreign nation" is an entirely new addition to the constitution, while the word "officer" is taken from a different context, and the explanatory phrase, "of the United States," has been dropped; altogether as an attempt to construe the Constitution, the attempt is an extremely unhappy one. The "fathers" would not themselves recognize their work under this guise.

The legality of the act of the President depends upon what interpretation is to be put upon the words of the constitution,—who are ambassadors, and other public ministers? Mr. Beck presupposes the answer to this important question.

"Colonel House's mission," he says, is "clearly a diplomatic one and is so understood by the Foreign Office of every European State." As such it has "no warrant whatever under the Constitution unless

he has been duly nominated to the Senate" and confirmed. The President is not forbidden from "securing information through any messenger that he may select for the purpose, and as long as the messenger does not assume a *diplomatic character* (italics ours) there can be no constitutional objection." Mr. Beck concedes the difficulty of drawing a line between an unofficial personal representative and a diplomatic official. The only criterion which he lays down, as determing the clearly official diplomatic character of Mr. House, is the fact of his reception by the officials of foreign countries.

An examination of the precedents which have been set by former Presidents, in this regard, will materially help in determining where the line has been drawn between a public minister, and a private agent. It will also furnish an interesting side light on the assertion that the mission of Colonel House is "unique in our history."

John Bassett Moore in his Digest of International Law[6] devotes a number of pages to an enumeration of the cases of appointment of special envoys without the consent of the Senate. The list includes more than twenty different instances in which the President has exercised this power, and is itself only a selection of a few cases from a list of more than four hundred like appointments, which was submitted to the consideration of the Senate, when the whole question which Mr. Beck has raised was under discussion.[7]

These instances show conclusively that the terms of the provision of the constitution providing for the approval of the Senate for foreign appointments have not been interpreted to include special agents of the president and that the action taken by President Wilson was only in accordance with a long line of precedents, which include a number of instances, in which these special agents have been accorded far more power and more extensive duties than have been entrusted to these men who have recently been sent by President Wilson.

Washington, who presided over the Convention which framed the Constitution, and who had as clear a knowledge of the meaning of its provisions, and as jealous a regard for its preservation as any public man who has ever served this country, was—to accept Mr. Beck's interpretation—the first offender. In 1789, when the constitution had been in operation only a few months, he directed Gouverneur Morris, who was then in Europe, to act as his private agent at the foreign office in London, and on "the authority and credit" of the letter given him by Washington, he was to converse with his "Brit-

[6] Vol. IV., page 452.

[7] Congressional Record for December 13, 1893, page 197.

tanic Majesty's ministers" as to matters which affected the two countries.[8] The criterion which Mr. Beck had advocated for distinguishing diplomatic and official from private character here falls to the ground. In claiming that by holding intercourse with the ministers of foreign countries, Colonel House was transformed from a private agent into a diplomatic official, a distinction is set up which was unknown to the framers of the Constitution themselves. There is no record to show that the Senate protested against the instructions of Washington to Morris or considered the President's action an invasion of Senatorial prerogative.

The mission of Colonel Humphreys, another private agent sent by Washington, was peculiarly similar to that of Colonel House. In one of his messages to the Senate the President explained his reasons for sending such an agent. It would be possible for President Wilson to use that same message, with merely a change of names, in explaining to the Senate his motives in dispatching Colonel House to Europe:

> "The aspect of affairs in Europe during the last summer, and especially between Spain and England, gave reason to expect a favorable occasion for pressing to accommodation the unsettled matters between them and us. Mr. Carmichael, our Chargé d'Affaires at Madrid, having been long absent from his country, great changes having taken place in our circumstances and sentiments during that interval, it was thought expedient to send some person, in a private character, fully acquainted with the present state of things here, to be the bearer of written and confidential instructions to him, in full and frequent conversations, of all those details of facts and topics of argument which could not be conveyed in writing, but which would be necessary to enable him to meet the reasonings of that Court with advantage. Col. David Humphreys was therefore sent for these purposes."

President Monroe, another of the contemporaries of the framing of the Constitution, was the next "offender." In 1816 he sent three commissioners, on a man of war, to investigate the condition of the Spanish Colonies in South America, with a view to their recognition. Again the Senate was not allowed to pass upon their names. Upon the attempt to secure from Congress, in the diplomatic appropria-

[8] American State Papers, Foreign Relations, 1-124.

tion bill, an appropriation of $30,000 to cover their expenses, the very question which is raised by Mr. Beck was agitated by Henry Clay in the House of Representatives; he insisted that if the envoys in question were diplomatic agents, they should not have been sent without the approval of the Senate. Congress, however, appropriated the money under the head of incidental expenses. Thus the action of the President not only did not receive congressional criticism, but was openly acquiesced in.

There was hardly a President from the time of Monroe to the present day who did not employ special agents. The missions of A. Dudley Mann to Hungary, at the time of Kossuth's rebellion, and of Nicholas Trist to Mexico to conclude peace in 1848, are the best known of these numerous special missions. In neither case was the Senate asked to pass upon the appointment. When Mann was sent to Hungary in 1849 there was already a diplomatic representative of the United States in Vienna. The mission of Commodore Perry to Japan in 1852 was not submitted to the Senate for approval.

Although the majority of these special agents were sent during the recess of the Senate, the constitutional question involved is not materially affected by this fact. The Constitution gives the President power to fill all vacancies which may occur during the recess of the Senate. These special representatives of the President's were not sent to fill vacancies in any office, since the office itself did not exist. If the President did not have the power to appoint these agents when Congress was in session he would not have the power during the recess, except on the assumption that he was making appointments to offices which had been created by Congress. But Congress had created no such offices.

During President Cleveland's second administration the right of the president to send special agents was reviewed, from both the constitutional and the historical point of view. Cleveland in 1893 had sent Mr. Blount as a special commissioner to Hawaii, with a letter of instruction which declared that in all matters affecting relations with the Government of the Hawaiian Islands his authority was to be paramount. He was to supersede the regular minister of the United States in the Islands, in all extraordinary matters which might arise, and was even empowered to use the military and naval force of the United States in case of the necessity of protecting American lives and interests.[9] Although the Senate was in session at the time of the sending of the special agent, his name was not sent to the Senate for approval. Here is a case where the constitutional

[9] Foreign Relations, 1894 App. II 467.

question might well have been raised. For a private agent to supersede a regularly appointed and commissioned minister was surely a new departure. A committee was appointed by the Senate to investigate the action of the President, with a view of determining whether he had exceeded his lawful authority. The majority report given by Senator Morgan entirely vindicated the President "A question has been made as to the right of the President of the United States to dispatch Mr. Blount to Hawaii as his personal representative for the purpose of seeking the further information which the President believed was necessary in order to arrive at a just conclusion regarding the state of affairs in Hawaii. Many precedents could be quoted to show that such power has been exercised by the President on various occasions, without dissent on the part of Congress. These precedents also show that the Senate of the United States, though in session, need not be consulted as to the appointment of such agents."[10]

As the greater includes the less, it is hardly just to attack the President for exceeding constitutional limitation in the appointment of such personal envoys as Lind and House—when the Senate has decided that President Cleveland, in sending a commissioner with such extended powers as those accorded to Blount, was acting within his legitimate powers.

The position for which Mr. Beck is sponsor involves more than a theoretical inaccuracy in the determination of what does or does not constitute official diplomatic character. It involves an attempt to weaken the Executive and exalt the Senate in regard to the control of foreign affairs. To force the President to consult the Senate in regard to the management of foreign relations would be fatal to consistent and efficient action. Since that body is in session only a portion of the time, it becomes inevitable that the President should have complete control during these periods of recess. If every session of Congress meant a review by the Senate of the conduct of foreign affairs, with a possible reversal of policy, the President would be powerless, and politics would soon be the controlling force in foreign negotiations. Any attempt to weaken the power of the Executive and to claim an extended power for the Senate over foreign affairs would be a fatal reversal of traditional American policy.

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[10] Foster, Practice of Diplomacy, 203.